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Where Regional Norms Matter: Contestation and the Domestic Impact of the African Charter on Democracy, Elections and Governance

Antonia Witt

Abstract

Twelve years after the adoption of the African Charter on Democracy, Elections and Governance, scholars and policymakers are still pondering whether the regional document has had any actual effect. Based on case studies from Madagascar and Burkina Faso, this article demonstrates the Charter's impact on political dynamics within both countries. By analysing contestations around the application of Article 25(4), which defines who is eligible to run in transitional elections, I show that various national and international actors (attempt to) use the Charter as a legal script to limit access to state power and restrict the electorate's voting choices. That these attempts are highly contentious is evidence of the Charter's effect. If it were seen as irrelevant, nobody would bother to contest it. I therefore suggest studying the effects of the Charter from a different analytical angle – that is, "bottom-up" – by focusing on the settings and places in which it is actually applied.

Keywords

African Union, African Charter on Democracy, Elections and Governance, norms, contestation, Madagascar, Burkina Faso

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Introduction

Over the past two decades, the African continent – like other world regions – has witnessed the evolution of a whole range of regional norms and institutions in the areas of peace, security, and democratic governance that set new standards for and help monitor developments within African states (Engel and Porto, 2010, 2013; Legler and Tieku, 2010; Vines, 2013; more generally, Börzel and van Hüllen, 2015; Pevehouse, 2005). However, scholars and policymakers alike are still debating whether and how these norms and institutions actually matter (Engel and Porto, 2014; Tieku, 2016; IPSS, 2017). In fact, in his 2017 report on the African Union (AU) reform agenda, Rwanda's President Paul Kagame noted:

> The Assembly has adopted more than 1,500 resolutions. Yet there is no easy way to determine how many of those have actually been implemented. By consistently failing to follow up on the implementation of the decisions we have made, the signal has been sent that they don't matter. (Kagame, 2017: 5)

The African Charter on Democracy, Elections and Governance (henceforth, the Charter), adopted in 2007 and in force since 2012, is a case in point. In its open meeting on 22 August 2018, the AU's Peace and Security Council (PSC) echoed Kagame's observation and asked whether the Charter had made a difference until that point (AU PSC, 2018). One year earlier, then AU Chairperson Dlamini-Zuma noted "modest gains in deepening a culture of democratic and participatory governance" since the adoption of the Charter, but also underlined the "democratic governance deficits that Africa continues to grapple with" (AU, 2017).

In fact, from the day of its adoption onwards, expectations of the effects of this regional doctrine were mixed at best: while for some it constituted "a major step in the protracted struggle for democracy [in Africa]" (Mangu, 2012: 372; see also, Glen, 2012: 120), others were more sceptical and argued that it remains

> an initiative by African leaders to provide African solutions to African challenges whilst ensuring that they do not unwittingly and simultaneously portray themselves as part of the African problem. (Saungweme, 2007: 7)

Such a reading was supported by the fact that during the preparation of the Charter several member states rejected especially those articles that directly challenge the rule of incumbents (AU, 2006: 2). Such provisions were consequently either left out or phrased in legally non-binding terms (Leininger, 2014: 12; Tigroudja, 2012: 282). Moreover, the fact that five years after its adoption only fifteen member states had ratified the Charter also showed member states' lack of enthusiasm for implementing this regional norm (AU, 2019; Matlosa, 2008: 9; Souaré, 2010). Based on this, it might reasonably be expected that the Charter amounts to nothing more than words on paper.

In this article, however, I illustrate that the Charter has indeed had an effect on political dynamics within AU member states – making it, then, much more than mere words on paper. More concretely, I demonstrate based on case studies from Madagascar and Burkina Faso that the Charter's provisions provide a legal script for decision-makers – both

national and regional – to regulate who has the right to access state power and thereby shape what are perceived as legitimate boundaries of rule. In order to make this visible, I suggest approaching the effects of the Charter from a different analytical angle – that is, to study them "bottom-up" by focusing on the settings and places in which it is actually applied. So far, little knowledge exists on these domestic dynamics.

When scrutinising the effects of AU norms, and the Charter more specifically, scholars and policy analysts employ quite different measures. On the one hand, there are those who focus on the *authors* of a given norm, for instance by investigating how consistently the Charter and its provisions are invoked and referenced in the official communications of the AU and Regional Economic Communities and thus structure how these organisations interpret and act upon the world (e.g. Edozie, 2014: 117; Engel, 2012; Legler and Tieku, 2010: 475). Other scholars, meanwhile, focus on the *addressees* of a particular norm. In this sense, a common measure would be the extent of ratification by AU member states and the Charter's translation into national legal frameworks (Kane, 2008: 51–52; Matlosa, 2014: 21; Souaré, 2010) or its impact on norm-conforming behaviour by African political elites. This is measurable, for example, by the decreasing incidence of coups (prohibited by the Charter) or changes in the quality of democracy (ISS, 2018; Souaré, 2014: 85; Touray, 2016: 155).

In this article, I propose studying the effects of the Charter by focusing on its application and contestation in practice – as well as the repercussions these have in concrete, localised social contexts (see Stepputat and Larsen, 2015: 4). Instead of demonstrating the effects by way of the norm-conforming behaviour of either a norm's authors or addressees, I use the *contestation* of norms – that is, the more or less public questioning of either their correct application or their normative validity – as empirical evidence for their relevance (Daase and Deitelhoff, 2017, 2019; Zimmermann et al., 2018). By questioning either its correct application or its normative validity, actors express their perception of the power and impact of a given norm. In other words, if actors perceived the norm as impotent and irrelevant, they would not bother to question it.

Against this background, in this article I explore the application and contestation of the Charter in two cases: (1) Madagascar, following the political crisis of 2009, in which President Marc Ravalomanana was ousted from power; and (2) Burkina Faso during and after the fall of President Blaise Compaoré, in October 2014. Both cases are among the ten situations since 2007 in which the AU has applied its policy framework on unconstitutional changes of government that is specified inter alia by the Charter (see Engel, 2012; Witt, 2012).[1] So far, unconstitutional changes of government have represented the situations in which the Charter's provisions have most often and most consistently come into play.

More concretely, I reconstruct the contested application of the Charter's provision that directly addresses the question of access to state power in the aftermath of an unconstitutional change of government. Article 25(4) of the Charter regulates the eligibility to run in transitional elections after such an unconstitutional change of government by prescribing that:

> The perpetrators of [an] unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State. (AU, 2007: Article 25(4))[2]

In practice, the first part of this provision has been applied more rigorously than the latter one has. On the face of it, this reads very uncontroversially: perpetrators of coups shall be banned from participating in transitional elections in order to prevent giving putschists the opportunity to legalise a coup d'état ex post facto.[3] Yet it still provides grounds for contestation, as it leaves certain fundamental questions open: Who counts as a perpetrator? And, who has the right to decide this?

As I will show, in both of the countries studied here the application of this provision was contested by a variety of actors – and not solely by those personally targeted by the exclusion. National and regional actors alike both invoked and contested the Charter's provisions in order to delineate the boundaries of legitimate access to state power precisely because these provisions are seen as having an effect. This demonstrates the Charter's political weight in practice. While providing evidence for this argument, both case studies also differ in that they reflect the range of actors – national and regional – capable of both invoking and contesting the Charter.

Yet the Charter's political weight also has a negative side to it: in both cases, upholding the Charter's provisions also meant curbing the democratic rights of others. In other words, applying the Charter produced both winners and losers. Thus, normatively and democratically, the Charter's impact on political dynamics within African states is at least ambiguous. One crucial consequence of these insights is thus that understanding who has the capacity to use the Charter for their (own) purposes and interests is not only relevant for empirical reasons, but is also normatively crucial – not least for all those living within the Charter's realms of jurisdiction.

The case studies are based on field research conducted between February and May 2014 in Madagascar and between January and February 2017 in Burkina Faso, which altogether comprised more than eighty interviews being conducted inter alia with Malagasy and Burkinabe members of the transitional governments, parliamentarians, party leaders, civil society activists, religious leaders, representatives of international and regional organisations, as well as bilateral donors based in both countries.[4] The insights generated from these interviews are strengthened by and checked against official AU documents and articles from Burkinabe and Malagasy newspaper outlets.

The remainder of this article is structured as follows. The next two sections explain how Article 25(4) of the Charter was both applied and contested in Madagascar and Burkina Faso, respectively. For each case, I first briefly summarise the context in which the Charter was invoked before presenting by whom and with what effects it was both applied and contested in the two countries. The final section summarises the article by drawing empirical, conceptual, and normative conclusions from the cases and specifying the added value of investigating the effects of regional norms from the bottom-up through their application and contestation in practice.

The Charter in Madagascar: Regional Enforcement and Its Contestation

In March 2009, after months of public protest, President Marc Ravalomanana handed over power to a military directorate which in turn installed an *Haute autorité de la transition* (HAT). The head of this HAT became Andry Rajoelina, the former mayor of Antananarivo, who dismantled all state institutions and promised a political renewal and transitional elections. The AU as well as numerous other regional and international organisations condemned this as an unconstitutional change of government, suspended Madagascar's participation, and demanded the re-establishment of constitutional order (Cawthra, 2010; Witt, 2013). What followed were several rounds of negotiations under the auspices of the SADC and its mediator Joaquim Chissano. However, these did not lead to tangible results. In September 2011, the "SADC Roadmap for Ending the Crisis" was signed by ten parties – including the two protagonists Ravalomanana and Rajoelina. It is in this context that the provisions of the Charter entered into negotiations concerning Madagascar's political future.

Applying Article 25(4) in Madagascar

The SADC Roadmap (deliberately) left two crucial questions open that had previously been the main bones of contention: first, whether and under what conditions Ravalomanana, who was in exile in South Africa, would be allowed to return to Madagascar; and second, who was eligible to run in presidential elections. Remarkably, the Roadmap included neither a reference to the Charter nor indeed to any other regional legal instrument. It only stipulated that:

> The President of the Transition, the consensus Prime Minister and Government Members shall resign from office sixty (60) days before the election date, should they decide to run for the legislative and presidential elections. (SADC, 2011: Article 14)

Thus, according to the Roadmap, this option would have also been open to Rajoelina. Moreover, the Roadmap also prescribed that "the HAT shall allow all Malagasy citizens in exile for political reasons to return to the country unconditionally" (SADC, 2011: Article 20), a paragraph tailored to meet Ravalomanana's demand to return to Madagascar. However, in reality, Rajoelina's support for transitional elections was based on the condition that Ravalomanana would *not* return to Madagascar before the elections and that he would be banned from presenting himself as a candidate in them.[5] A compromise solution was therefore suggested: the so-called *ni-ni* (neither/nor) solution, which meant that neither Ravalomanana nor Rajoelina would run for presidential office.

Although initially sceptical about this solution, the AU and SADC finally supported the compromise (AU Commission, 2013a; SADC, 2012). For the AU, the *ni-ni* solution was in line with Article 25(4) of the Charter *and* promised to finally bring the long search for constitutional order in Madagascar to an end. For SADC, this decision actually meant a rupture in its approach to the Malagasy crisis as until then it had strongly supported Ravalomanana's right to return and present himself as a presidential candidate.

However, as one SADC official noted, the regional organisation had to "sacrifice Ravalomanana" so that constitutional order could be re-established as quickly as possible.[6] Officially, SADC's decision that "Mr. Marc Ravalomanana and Mr. Andry Rajoelina should be persuaded not to stand in the forthcoming general elections" (SADC, 2012) was not further justified. In fact, in its official decisions SADC made reference neither to the Charter nor to any other legal instrument. Yet in retrospect, SADC officials uniformly described this decision as being in line with and necessitated by the provisions of the Charter.[7]

However, developments in Madagascar took a fresh turn. Regardless of the *ni-ni* agreement, Rajoelina filed his candidacy in early May 2013. He justified this decision with the fact that Ravalomanana's wife, Lalao, had also filed hers. Didier Ratsiraka, one of Madagascar's former presidents and someone who had refused to sign the SADC Roadmap, also stood as a candidate in these elections.

The candidacies of all three caused diplomatic outrage. The AU PSC, the SADC Summit, and the International Contact Group on Madagascar (ICG-M) all condemned Rajoelina's reneging on the *ni-ni* principle. Moreover, they pointed out that both Lalao Ravalomanana and Ratsiraka had violated the requirement of six months' residency in Madagascar prior to elections as enshrined in national electoral law. All three were consequently denounced as "illegitimate candidacies" (AU PSC, 2013; ICG-M, 2013; SADC, 2013a). The PSC, in its decision given on 16 May 2013, referred to Article 25(4) of the Charter as well as to the 2010 AU Assembly decision that "perpetrators of an unconstitutional change of government cannot participate in elections organized to restore constitutional order" (AU PSC, 2013). The Council stressed that "they will not recognize the Malagasy authorities which would be elected in violation of the relevant AU and SADC decisions" (AU PSC, 2013). A week before, the SADC Troika had

> expressed its displeasure on the decision of H.E. Rajoelina to renege on his earlier undertaking not to stand in the forthcoming Presidential election [and] expressed its disappointment with the unwise decision of Mouvance Ravalomanana to present Lalao Ravalomanana [. . .] as Presidential candidate. (SADC, 2013b)

The Troika urged Rajoelina, Ravalomanana, and Ratsiraka "to consider withdrawing their candidatures to ensure [the] peaceful conduct of elections and stability in Madagascar" (SADC, 2013b). The ICG-M on 26 June reiterated that the "international community as a whole would not recognize the Malagasy authorities elected in violation of the relevant decisions of both the AU and SADC" (ICG-M, 2013). The group also

> recommended that Madagascar's international partners who have made contributions or pledges to the electoral process to make the necessary arrangements temporarily to freeze such support [and] encouraged the international community to consider applying robust, targeted sanctions against all Malagasy stakeholders undermining the smooth running of the electoral process and the full implementation of the Roadmap. (ICG-M, 2013)

AU Commissioner for Peace and Security, Ramtane Lamamra, travelled to Antananarivo in order to present a so-called 7-Point Plan which the ICG-M had adopted. The

plan foresaw that Rajoelina should dismantle the Special Electoral Court (Cour électorale spéciale, CES) that had accepted the three candidacies, while a newly composed Court should present a fresh list of them (AU Commission, 2013b). Those who "voluntarily" withdrew their candidacies would be allowed to nominate a replacement. The ICG-M also threatened that those not complying with the 7-Point Plan would be subject to further individual targeted sanctions (AU Commission, 2013b). Rajoelina finally bowed to international pressure, dismantled the CES that had accepted the three candidacies, and a new list – without these three names on it – was announced. The banned candidates nominated their respective replacements, and presidential elections were finally held in October and December 2013. They were won by Hery Rajaonarimampianina, who had run as Rajoelina's replacement.

Contesting Article 25(4) in Madagascar

Internationally, the diplomatic efforts to prevent Rajoelina from running in presidential elections were hailed as a great success and a symbol of concerted action in defence of AU principles.[8] Yet, in Madagascar this intervention sparked fierce criticism from several sides. Questions were asked with regard to both the general right of the AU, SADC, and others to decide who is eligible to run in presidential elections, as well as the concrete way in which Article 25(4) was invoked in this particular case.

Even within the local diplomatic community, the "success" of this intervention was questioned. The US government, for instance, officially opted for dropping the *ni-ni* principle, although this was a minority position among ICG-M members (Indian Ocean Newsletter, 2013).[9] In a meeting of the local ICG-M, the Russian ambassador allegedly asked his colleagues why they did not also decide who was going to win the presidential elections if they had already defined who was a legitimate candidate.[10] In a similar vein, the AU's former special envoy to Madagascar, Ablassé Ouédraogo, publicly criticised the AU's decision and argued that what mattered was that Malagasies find their *own* solution to the political crisis and that they should be allowed to decide for themselves who is a legitimate candidate (RFI, 2013). In the Malagasy press the ICG-M's 7-Point Plan was called the "seven commandments," underlining that it contradicted the goal formulated in the mediator's mandate of letting "Malagasy people take full ownership of the process" (*L'Express de Madagascar*, 2013; SADC, 2009). This, so the argument went, would include letting Malagasies decide whom to vote into the presidential office. Moreover, others argued that invoking the Charter was illegal in this case anyway, as Madagascar had until then neither signed nor ratified it.[11]

However criticism was also aimed at the specific manner in which Article 25(4) was invoked here, in particular by those who felt illegitimately targeted by it. Following the decisions of the AU and SADC Summit to declare Lalao Ravalomanana's candidacy illegal, the supporters of Marc Ravalomanana, for instance, undertook diplomatic efforts in order to convince SADC and the AU to revoke their decisions (Mouvance Ravalomanana, 2013a). They argued that Rajoelina and the transitional government had actually, on several occasions, prevented Lalao Ravalomanana from returning to Madagascar. Invoking the residency precondition to prevent her from running as

presidential candidate was thus unjustified. Moreover, they pointed out that the cases of the three candidates were not all the same: only Rajoelina's candidacy violated the Charter (Mouvance Ravalomanana, 2013a: 2). In this sense, the AU and SADC decisions were said to be based on

> a partial, even biased analysis of the facts of the case and on a wrong application of the norms, principles and relevant provisions taken from reference texts. (Mouvance Ravalomanana, 2013b: 2; see also, Kotze, 2013: 7)

Several letters and reports to the AU chairperson and SADC Summit explained that excluding Lalao Ravalomanana actually violated her civil and political rights as guaranteed under the United Nations (UN) International Covenant on Civil and Political Rights (Mouvance Ravalomanana, 2013c). In a letter to AU Chairperson Dlamini-Zuma, Mamy Rakotoarivelo, the head of the group, wrote:

> Not only is it technically inaccurate to call the candidature of Lalao Ravalomanana "illegitimate", but it could represent a potential violation of her civil and political rights to present herself as a candidate under the aforementioned International Covenant on Civil and Political Rights. (Mouvance Ravalomanana, 2013d: 8)

Moreover, he suggested that, rather than deciding on who is a legitimate candidate, the AU and SADC should make sure that elections are actually free, fair, and in the interest of the Malagasy people (Mouvance Ravalomanana, 2013d: 9). Despite these submissions and a number of visits by Ravalomanana's international lawyers, neither the AU nor SADC ultimately revoked their decision.

In sum, in Madagascar the Charter's provisions were regionally enforced by the AU – which sought to prevent yet another precedent for putschists being able to legitimise remaining in power ex post facto. In this sense, Article 25(4) of the Charter provided a legal script for regional actors to decide on the eligibility to contest elections – and thus effectively placed limits on access to state power. Although the application of Article 25(4) was successfully enforced, it was also highly contested. First, various national and international actors questioned the correctness of the Charter's application in this case, particularly the exclusion of the two candidates other than Rajoelina – whose cases in reality did not fall under the provisions of the Charter (Kotze, 2013: 7). Second, the regional enforcement of Article 25(4) also encouraged the feeling that elections in Madagascar were ultimately subject to AU decisions rather than a result of the Malagasy electorate exercising its fundamental democratic right to decide how and by whom it wanted to be governed. It is these contestations that provide evidence of both the Charter's effects on political dynamics within AU member states as well as the normative ambiguity of these impacts.

The Charter in Burkina Faso: A (Failed) Means of Defending the "Popular Insurrection"

In Burkina Faso, Article 25(4) of the Charter was also applied in the context of an unconstitutional change of government. However, unlike in Madagascar, it was a faction

of the national political elite rather than regional actors who invoked the Charter here in order to gain access to elections and defend their own claims to power. The political crisis that led to this unconstitutional change of government, occurring in October 2014, started with President Blaise Compaoré's attempt to change the Constitution and prolong his term of office. On 21 October 2014, the Burkinabe Council of Ministers submitted a bill to Parliament suggesting an amendment to Article 37 of the Constitution – which limits presidential terms to a maximum of two. This was preceded by weeks of public protest against the constitutional amendment. Yet even before Parliament was able to adopt the proposed bill, civic pressure from the streets forced Compaoré to revoke his plan, resign, and flee to neighbouring Côte d'Ivoire. The "popular insurrection," as it is called today in Burkina Faso, was led by a broad front of civil society organisations and opposition parties (see, for instance, Chouli, 2015; Frère and Englebert, 2015).

Applying Article 25(4) in Burkina Faso

Neither the AU nor the Economic Community of West African States (ECOWAS) had directly and publicly reacted to Compaoré's plan to prolong his term in office, even though it violated the provision of the ECOWAS Protocol on Democracy and Good Governance that

> no substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors. (ECOWAS, 2001: chapter 1, Article 2(1))

Moreover, in April 2014 the AU PSC had listed the "manipulation of the constitution" as one of the "potent triggers for unconstitutional changes of government and popular uprisings" (AU PSC, 2014a) – but nevertheless remained silent on the Burkina Faso case. While Compaoré's resignation had created a void at the highest level of the state, several high-ranking military figures – among them General Zida, the deputy chief of the presidential regiment – had stepped in and taken control of the transition to constitutional order. Both the AU and ECOWAS demanded that power should be returned to a civilian-led government, which should make preparations for a transition process and eventually elections (AU PSC, 2014b; ECOWAS, 2014). On 16 November, the so-called Charter of the Transition was signed. Michel Kafando was nominated as "President of the Transition," while General Zida became the transitional "Prime Minister."

In its preamble, the Charter of the Transition made reference to the African Charter on Democracy, Elections and Governance as well as to the ECOWAS Protocol on Democracy and Good Governance. With this, the authors wanted to underline that Compaoré's attempt to prolong his term in office had been in breach of regional and continental norms and that the transition marked a political and normative rupture with such undemocratic practices.[12] The Charter of the Transition defined the values and institutions of the transition and marked out the way forward to transitional elections, scheduled for October 2015 (Burkina Faso, 2014).

In preparation for this, the National Transitional Council (Conseil national de la transition, CNT) on 7 April 2015 adopted a contentious revision of the electoral code which stipulated that banned from participating in transitional elections should be

> all persons having supported an unconstitutional change of government that has hampered the principle of democratic alternation, notably the principle limiting the number of presidential mandates, which has led to an insurrection or any other form of uprising. (Burkina Faso, 2015: Article 135)[13]

This decision to extend the legal grounds for excluding certain actors from participating in elections was justified by reference to the AU Charter and its Article 25(4). The majority in Parliament argued that the rationale of the transition was to mark a complete break with the previous regime and the governance system of Compaoré. In this way, the exclusion clause would guarantee that the transition was not recaptured ex post facto by Compaoré's cadres. Moreover, they argued that Compaoré's attempt to prolong his term in office actually qualified as an unconstitutional change of government according to the Charter.[14] All those who actively supported this attempt – meaning the Ministerial Council as well as the parliamentarians willing to adopt the bill – should consequently be considered "perpetrators of an unconstitutional change of government," as defined by the Charter. With this, the parliamentarians argued, their predecessors had invalidated their right to participate in transitional elections.

Contesting Article 25(4) in Burkina Faso

Unsurprisingly, the new electoral code provoked spontaneous rallies by both supporters and critics in Ouagadougou and other larger cities around the country, and hence became the most contentious issue within the transition process (Allafrica, 2015a; Le Pays, 2015a). Targeted by the amended exclusion clause in the electoral bill were first of all members of the former president's party, the Congrès pour la Démocratie et le Progrès (CDP), and also allied parties such as the Nouvelle Alliance du Faso (NAFA). Initially, the deputies of the outgoing regime challenged the competence of the CNT to adopt such a revision of the electoral code, and then decided to withdraw from all transitional institutions – including the CNT and the National Commission for Reconciliation. They also sought to mobilise diplomatic and judicial support against the new electoral code, in among other ways by contacting the members of the International Monitoring and Support Task Force of the Transition in Burkina Faso (GISAT-BF) – an international coordination mechanism jointly headed by the AU and ECOWAS. Moreover, on 21 May 2015, seven political parties and thirteen individual citizens occupied the ECOWAS Community Court of Justice, arguing that the electoral code violated their human rights as enshrined in the UN Declaration on Human Rights, the African Charter on Human and Peoples' Rights, as well as the African Charter on Democracy, Elections and Governance and the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Court, 2015: 4–6).

The AU and ECOWAS did not intervene publicly in any of this, neither defending the popular interpretation and application of the Charter and the ECOWAS Protocol nor

supporting Compaoré's former allies. Among the diplomatic community in Ouagadougou, only the US Embassy took a public stand.[15] In late April 2015, the embassy announced that changes to the code "would seem to be inconsistent with the democratic principles of freedom of expression, freedom of association, and free, fair, and peaceful elections" and called upon the transitional government "to use a coordinated, consensual, and inclusive approach in conducting the elections" (US Embassy, 2015).

On 13 July, the ECOWAS Court decided that the bill was in violation of regional and international law and demanded that all obstacles to participation in transitional elections should be lifted (ECOWAS Court, 2015: 14). The Court explained that there were no justifiable reasons for excluding such a broad number of individuals from participating in democratic elections specifically on the basis of such "ambiguous criteria" (ECOWAS Court, 2015: 11). It argued that:

> Prohibiting the candidatures of all organizations or persons having been politically close to the ousted regime but not having committed a particular offense amounts, for the Court, to the introduction of a thought crime that is evidently inacceptable. (ECOWAS Court, 2015: 11)[16]

Moreover, the Court also claimed that sanctions for unconstitutional changes of government can only be applied against regimes and states – including their leaders – but not the rights of ordinary citizens (ECOWAS Court, 2015: 11). And finally, the Court held that the exclusion envisaged was neither legal nor necessary for the stabilisation of the democratic order in Burkina Faso. Rather, it significantly limited the choice of the Burkinabe electorate and thus undermined the competitive character of the elections (ECOWAS Court, 2015: 12).

In Burkina Faso, the decision of the ECOWAS Court was immediately rejected by one faction of the political elite. Mocking the Court's attempt to enforce a particular interpretation of regional and international law, some members of the transitional government even argued that the Court's decision *itself* was in breach of the ECOWAS Protocol. Imposing the revision of the electoral code only four months prior to the scheduled elections would, in fact, infringe chapter 1, Article 2(1) of the Protocol (as cited above).[17]

While the Constitutional Council finally annulled forty-eight candidacies – all of the individuals concerned being former affiliates of Compaoré – tensions surrounding the "inclusiveness" of the transition process and the fate of former cadres were aggravated. For some, as in Compaoré's time, politics was once again an instrument "to regulate personal interests" (Le Pays, 2015b; see also, ICG, 2015: 5). This prepared the basis on which Article 25(4) of the Charter would once more be both applied and contested in Burkina Faso's transition to constitutional rule.

Applying and Contesting Article 25(4) Again

On 16 September 2015, the Presidential Security Regiment (Régiment de sécurité presidentielle, RSP), Compaoré's former presidential guard, stormed a meeting of the transitional government and took the transitional president, the prime minister, and

several ministers hostage. Like Compaoré's political allies, the RSP was threatened with marginalisation by the transitional regime; a few days earlier the National Reconciliation Commission had suggested the total dissolution of it. The next morning, a junior RSP member, Mamadou Bamba, announced on TV the suspension of the transitional institutions and the takeover of power by a newly formed National Democratic Council (Conseil national démocratique, CND) in order to prevent the further deterioration of the transition process. A new government would be formed in order to prepare "inclusive and peaceful elections" (Afrik.com, 2015). In his announcement, Bamba proclaimed that

> the electoral code, tailored in favour of individuals and slated by authorities and lawyers, appears as instrument to negate the values of our people, based on the spirit of justice, equity, and tolerance. This code has created a division and a great frustration on the part of our people, creating two kinds of citizens. [. . .] Democracy, that is the right of all citizens to elect and to be elected. (Afrik.com, 2015)[18]

In Burkina Faso, the coup d'état was widely rejected and condemned as a threat to the achievements of the "popular insurrection" of October 2014 (Hagberg, 2015: 111; Zeilig, 2017). Trade unions and civil society organisations immediately mobilised, and thousands of people took to the streets in protest against the RSP. The political elite formerly close to Compaoré, in turn, adopted a more ambiguous stance regarding the takeover by the RSP. Some used the opportunity to call for "inclusive elections" while refraining from publicly defending the coup; others expressed indirect support for it and criticised the transitional government for having exacerbated tensions (Bjarnesen and Lazano, 2015: 4). Internationally, the coup was immediately condemned as the AU, ECOWAS, and the UN jointly called for the unconditional release of the hostages and confirmed their support for the elections scheduled for October 2015 (Allafrica, 2015b). However, the AU and ECOWAS also differed greatly in how they interpreted the situation – which had clear repercussions in Burkina Faso itself.

The AU PSC decided to suspend Burkina Faso from the AU, and called the putschists "terrorist elements" (AU PSC, 2015a). The Council also threatened to impose travel bans, freeze the putschists' bank accounts, and to open criminal investigations against them (AU PSC, 2015a). In so doing it invoked the Charter, namely its provisions imposing sanctions on the perpetrators of coups and those prohibiting them from holding "any position of responsibility in the political institutions of their states" (AU PSC, 2015a, 2015b). In Burkinabe media, the AU's decision to "call a spade a spade" and show zero tolerance towards the putschists was openly applauded (Le Pays, 2015d).[19]

By contrast, ECOWAS heads of state took a more accommodating position. They dispatched the presidents of Senegal and Benin, Macky Sall and Yayi Boni, to Ouagadougou to ensure the transitional authorities would be released and the transition process resumed. However, their decision to intervene became contentious in the eyes of many Burkinabe (see Saidou, 2018: 48). First, the mediators prepared a preliminary political accord which included an amnesty provision for the perpetrators. This clearly infringed on the provisions of the Charter and also contradicted the AU's principled stance. Second, the political accord sought to undo the amended electoral code by stipulating that the persons whose candidacies had been invalidated in that amended code should

now be authorised to participate in the forthcoming elections (Ouaga.com, 2015). In addition, the ECOWAS summit on 22 September 2015 also called "for peace, open mindedness and a spirit of compromise" and "urged all stakeholders to expedite action in creating the necessary conditions for national reconciliation" (ECOWAS, 2015). The summit also refrained from threatening to impose sanctions on the putschists.

For the members of the Burkinabe transitional government and many civil society actors, this was proof that ECOWAS heads of state still supported the cadres of the old regime (IRIN, 2015; Le Pays, 2015c; Saidou, 2018: 49–51). The ECOWAS summit and the two mediators were thus publicly criticised for being partial and for infringing regional norms, including the Charter (Le Pays, 2015g, 2015h; Saidou, 2018: 50; Seneweb, 2015). Both the transitional president as well as numerous civil society actors hence publicly rejected ECOWAS's and the mediators' proposals (Le Pays, 2015e, 2015f). Faced with this resistance from the Burkinabe transitional government and the public rallies organised against the RSP, the ECOWAS summit ultimately did not adopt the mediators' suggested political accord. Both the electoral code and the juridical aftermath of the September 2015 coup were left to the reinstated transitional institutions and the soon-to-be-elected new government instead.

In sum, in Burkina Faso it was – unlike in Madagascar – the transitional government and those defending the "popular insurrection" who used the Charter as a legal script for defining eligibility to run in elections and restricting access to state power. Unsurprisingly, this move was contested not only by those directly affected by it but also internationally. In the first instance, meaning the dispute about the new electoral code, both Compaoré's former allies and the ECOWAS Court denounced the applicability of the Charter to this situation. The Court considered it too substantial an intervention in Burkina Faso's democratic politics and even questioned its applicability to individual citizens. In the second instance, namely the September 2015 coup, it was the ECOWAS summit and its mediators that explicitly rejected invoking the Charter's provisions against the perpetrators of coups. With this, they not only contradicted the AU's more principled stance but also the popular will in Burkina Faso – to which ECOWAS, nevertheless, eventually had to surrender. Unlike Madagascar, the case of Burkina Faso thus also demonstrates greater international dissonance concerning how to interpret and where to apply the Charter. The answers to this, as in Madagascar, have an immediate impact on the political dynamics in the country and are therefore, unsurprisingly, highly contested. Hence the debates about the electoral code and the ensuing September coup provide further evidence for the political weight of the Charter's provisions, and indeed the ambiguous effects that they may have once invoked.

Conclusion

Twelve years after its adoption, only thirty-two of the fifty-five AU member states have ratified the African Charter on Democracy, Elections and Governance (AU, 2019). This reflects AU member states' reluctance to give life to what was once deemed "a major step in the protracted struggle for democracy [in Africa]" (Mangu, 2012: 372). Whether such a document is having an effect on the ground can therefore rightly be questioned.

Yet, as has been revealed in this article, the Charter is already much more than mere words on paper, as sceptics still often argue. In fact, analysing the Charter's effects "from the bottom-up" – specifically by examining the application and contestation of its Article 25(4) in concrete situations – I have demonstrated that the Charter does indeed have crucial political weight. The decision about who has the right to contest in transitional elections – the purview of Article 25(4) – has a clear effect: it provides a legal script for various actors to delineate access to state power. This not only affects the political fate of individuals, but also potentially constrains people's choices when it comes to deciding how and by whom they want to be governed.

Compared with the rest of the Charter, the provisions on unconstitutional changes of government are said to be particularly legalistic in character (Legler and Tieku, 2010: 482; Leininger, 2014). The legal clarity of Article 25(4), as well as the sheer number and importance of unconstitutional changes of government, may therefore explain why this clause in particular has exerted such a crucial empirical effect. Whether other provisions of the Charter have had a similar effect requires further investigation. Nonetheless, I have shown that – contrary to the assumptions in the literature – the legalistic character of Article 25(4) does not make it less prone to contestation. Three types of conclusion can hereby be drawn: empirical, conceptual, and normative.

Empirically, this article has provided evidence of the Charter's impact on political dynamics within two African states. The question of who has the right to access state power remains one of the key political questions, in Africa as elsewhere. Unsurprisingly, in Madagascar and Burkina Faso the application of Article 25(4) sparked fierce contestation from both national and international actors alike. Who counts as a perpetrator and who has the right to decide this became contentious in both transitional processes. It is through this contestation, I have argued, that the Charter's political weight becomes visible. Because it is seen as having an effect, actors go to the trouble of contesting it and argue about its correct scope of application. Nonetheless, both cases show different trajectories in the politics involved in applying Article 25(4), and shed light on the variety of actors capable of both invoking and contesting the Charter's different provisions.

In Madagascar, it was the AU – with the support of SADC and the ICG-M – that invoked the Charter in order to exclude certain candidates from transitional elections and to ensure the rapid re-establishment of constitutional order. In Burkina Faso, by contrast, it was the transitional regime that used the Charter's provisions in order to defend the "popular insurrection" and to signify a rupture with the previous regime. Hence in both cases, the Charter's provisions were effectively used to justify and rationalise decisions over who has the right to access state power – and thus they had an immediate impact on political dynamics within both countries. Nonetheless, in both cases the application of Article 25(4) was highly contested – and not only by those directly targeted by it. Crucially, the case of Burkina Faso showed that between the AU and ECOWAS – but also among the different ECOWAS institutions – where exactly to apply Article 25(4) and who counts as a perpetrator is anything but a consensus view.

Conceptually, the article therefore sought to offer an alternative perspective for studying the effects of regional norms "from the bottom-up" – one which sheds light on

dynamics within AU member states that have otherwise been neglected in empirical analyses. In sum, the Charter's (ambiguous) political weight, as explained above, cannot be grasped by studying the effects in terms of norm-conforming behaviour by either a norm's authors or its addressees. If the first perspective – the behaviour of the norm's authors – had been adopted, the inconsistent invocation by the AU, SADC, and ECOWAS would have suggested in both cases that the Charter had little effect. Moreover, such a perspective would have completely ignored the normative agency of other actors beyond the norm's authors, such as the transitional government in the case of Burkina Faso. With regard to the second perspective – the typical behaviour of the norm's addressees – the successful thwarting of "the perpetrators" would have been observed in both cases, but at the expense of understanding the normative debates about who even counts as a perpetrator as well as the ambiguous consequences that the answers to this question have in practice. In sum, understanding the power of regional norms through their application and contestation in practice sheds light on two key issues: first, the domestic dynamics and multiple agencies involved in making regional norms matter on the ground and, second, the various meanings attached to such norms, which provide an analytical inroad into understanding their politics and ambiguities as experienced and lived reality.

Finally, in terms of normative conclusions, I have shown that in both cases the Charter's political weight was clearly ambiguous: when it was applied, this also meant curbing the democratic rights of some and restricting the electorate's democratic choosing of candidates. For the ECOWAS judges, for instance, this was too much of an intervention. Where to draw the line of acceptable sacrifices is a normatively crucial question, not least for all those living under the Charter's jurisdiction. Taking a close-up view and revealing how and by whom the Charter is employed and contested can thus provide the necessary empirical insights for making such a normative judgement.

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Notes

1. These are Mauritania 2008, Guinea 2008, Madagascar 2009, Niger 2010, Mali 2012, Guinea-Bissau 2012, Central African Republic 2013, Egypt 2013, Burkina Faso 2014–2015, and The Gambia 2016.
2. While AU member states only reluctantly ratified the Charter, in January 2010 the AU Assembly adopted a decision that confirmed the provisions of Article 25(4) (AU Assembly, 2010). This can be interpreted as a measure for implementing the Charter's provisions even before it was actually in force and to enlarge its scope of application even to those countries which had not yet signed and ratified it.

3. This happened, for instance, after the 2008 unconstitutional change of government in Mauritania, where Mohamed Ould Abdel Aziz was able to win the 2009 transitional elections. Although in 2008 the Charter was not yet in force, Mauritania had already signed and ratified it at the time the unconstitutional change of government took place. Similarly in Egypt in 2014, Abdel Fattah el-Sisi was internationally recognised as the legitimate winner of the elections which re-established constitutional order after the ousting of President Mursi.
4. The fieldwork in Madagascar was part of the author's PhD research, and consequently much more comprehensive than in the case of Burkina Faso. The case study also draws on interviews conducted with officials at AU headquarters in Addis Ababa, Ethiopia in April/May 2013 as well as with ones at Southern African Development Community (SADC) headquarters in Gaborone, Botswana in May-July 2014.
5. Interview, adviser to the AU special envoy, 17 February 2014, Antananarivo; interview, former OIF official, 10 March 2014, Antananarivo.
6. Interview, SADC liaison officer, 31 March 2014, Antananarivo.
7. Interview, SADC liaison officer, 5 March 2014, Antananarivo; interview, SADC liaison officer, 31 March 2014, Antananarivo; interview, SADC official, 19 May 2014, Gaborone.
8. Interview, EU official, 21 February 2014, Antananarivo; interview, member of the diplomatic corps, 26 February 2014, Antananarivo.
9. Interview, member of the diplomatic corps, 24 February 2014, Antananarivo; interview, AU official, 13 May 2013, Addis Ababa.
10. Interview, member of the diplomatic corps, 24 February 2014, Antananarivo; interview, member of the diplomatic corps, 2 April 2014, Antananarivo.
11. Interview, adviser to the AU special envoy, 17 February 2014, Antananarivo; interview, former OIF official, 10 March 2014, Antananarivo.
12. Interview, member of CNT, 2 February 2017, Ouagadougou.
13. Author's own translation of the original text in French.
14. Among the five situations defined as unconstitutional changes of government, the Charter also lists "any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government" (AU, 2007: Article 23(5)). Furthermore, Article 10(2) defines that "State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum" (AU, 2007: Article 10(2)).
15. Interview, Burkinabe academic, 3 February 2017, Ouagadougou.
16. Author's own translation of the original text in French.
17. Interview, member of CNT, 2 February 2017, Ouagadougou.
18. Author's own translation of the original text in French.
19. However, the AU also did not explicitly *defend* the Charter's provisions. In fact, until the September coup, the AU did not make any public pronouncement on the electoral code. And despite its initially principled decisions against the perpetrators of the September coup, including the application of sanctions, once the transitional government had been reinstalled the PSC decided to put the implementation of the sanctions on hold – including the criminal investigations that had initially been threatened (AU PSC, 2015b).

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Wo regionale Normen wirken: Kontestation und der innerstaatliche Effekt der African Charter on Democracy, Elections and Governance

Zusammenfassung

Zwölf Jahre nach der Verabschiedung der African Charter on Democracy, Elections and Governance debattieren Wissenschaft und Politik immer noch darüber, ob die Charter bisher überhaupt eine Wirkung erzielt hat. Basierend auf Fallstudien aus Madagaskar und Burkina Faso zeigt dieser Aufsatz den innerstaatlichen Effekt der Afrikanischen Demokratie-Charta. Dafür analysiere ich Kontestationen im Zuge der Anwendung von Artikel 25(4) der Charta, welcher definiert, wer sich als Kandidat und Kandidatin in Übergangswahlen präsentieren darf. Dabei zeige ich, dass verschiedene nationale und internationale Akteure die Charta als rechtliches Skript (zu) nutzen (versuchen), um den Zugang zu Staatsmacht und die Wahlmöglichkeiten des Volkes zu beschränken. Der Effekt der Charta zeigt sich nicht zuletzt darin, dass diese Versuche kontrovers diskutiert wurden. Sähe man die Charta als wirkungslos an, würde sich niemand bemühen zu widersprechen. Ich schlage deshalb vor, die Effekte der Charta aus "bottom-up"-Perspektive zu erforschen, in dem auf die Kontexte und Orte fokussiert wird, in dem sie konkret Anwendung findet.

Schlagwörter

Afrikanische Union, African Charter on Democracy, Elections and Governance, Normen, Kontestation, Madagaskar, Burkina Faso